HAN EUU TIAM

v.

PHANG KUI FATT & ORS

HIGH COURT MALAYA, TEMERLOH
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: 22-38-99]
18 SEPTEMBER 1999

CIVIL PROCEDURE: *Affidavit - Jurat - Non-compliance with rules - Jurat contravening O. 41 r. 1(7) & (8) Rules of the High Court 1980 - Whether affidavit rendered invalid - Rules of High Court 1980, O. 29 r. 1, O. 41 r. 1(7) & (8), O. 41 r. 4, Form 78*

The plaintiff had applied for an interlocutory injunction under O. 29 r. 1 Rules of the High Court 1980 ('RHC') to restrain the defendants from using certain machinery and equipment. The application was supported by four affidavits of the plaintiff which he affirmed in the Malay language. At the hearing, the defendants raised a preliminary objection that the affidavits had contravened O. 41 r. 1 (7) & (8) of the RHC and were therefore invalid. The facts showed that the affidavits in question did not have a jurat in the form as prescribed by O. 41 r. 1 (7) & (8) RHC, and that being so, a question arose as to whether the affidavits were invalid, and if so whether the plaintiff's application ought on that ground to be dismissed.

Held:

[1] There has not been compliance with O. 41 r. 1 (7) & (8) and Form 78. First, there is no title in the jurat used in all the affidavits. Second, neither the words 'To an affidavit by one deponent …' (Form 78(a)) nor the words 'To an affidavit by a blind (illiterate) person …' (Form 78(c)), as the case may be, are found in the jurat. These words are significant because they certify the circumstances of the deponent in the making of the affidavit, and indicate which particular form in Form 78 is being used.

[2] Form 78(a) must be used if the deponent is neither blind nor illiterate but is not conversant in the Malay language. The affidavit must be interpreted to him in the language that he understands by a competent interpreter, and thereafter that part of the form which reads '(Through the interpretation of …') must be completed accordingly. The full name of the interpreter and the language used to interpret the contents of the affidavit must be recorded in the blank spaces provided in the bracket.

[2a] Form 78(a) must still be used, and completed, if the deponent is conversant in the Malay language and is not blind or illiterate. Only thing is that the Form must now be completed by inserting in the blank spaces within the bracket the words 'interpretation not required'.

[2b] Alternatively, and an easier way, would be for the Commissioner for Oaths, when preparing the jurat certificate, to simply drop the whole words in the bracket (ie. the words 'Through the interpretation of …') from the form. When the words in the bracket do not appear in the jurat certificate, the court will assume that the deponent is conversant in the Malay language.

[3] If the deponent is blind or illiterate, then Form 78(c) must be used.

[4] Strict compliance with the prescribed format is necessary. In this case, there has been a departure from the prescribed format and such departure is not trivial. In view of the substantial deviation, and bearing in mind that O. 41 r. 1 (7) & (8) uses the word 'must', the jurat as used by the plaintiff is not a valid jurat. The affidavits are defective and unacceptable and the interlocutory application must on that ground fail.

[5] The plaintiff's oral application for leave to use the defective affidavits pursuant to O. 41 r 4 RHC, being made at the eleventh hour, must also fail. The last minute application is yet another example of lip service application of rules of procedure.

[Preliminary objection upheld; application dismissed.]

Legislation referred to:
Rules of the High Court 1980, O. 29 r. 1, O. 41 rr. 1(7) & (8), 4

Other source(s) referred to:
Jowitt's Dictionary of English Law, 1977 edn

For the plaintiff - Joseph Sebastian; M/s Amran, Joseph, Chan & Co
For the defendants - Rozilan Abdul Rahman; M/s Suhaimi, Tan, Zamani & Rozilan

Reported by WA Sharif

JUDGMENT

Hishamudin Yunus J:

In the present case, pursuant to the filing of the civil suit, the plaintiff has filed an interlocutory application under O. 29 r. 1 of the Rules of the High Court (the "RHC") seeking an interlocutory injunction to restrain the defendants from using certain machinery and equipment located on a specified piece of land. The plaintiff alleges that the machinery and equipment belong to him and that he has not given any consent to the defendants to use them.

For the purpose of this interlocutory application, the plaintiff has filed four affidavits, namely, encls. 3, 6, 18 and 19. All the four affidavits are in the Malay language.

At the commencement of the hearing of this interlocutory application, the learned counsel for the defendants, Encik Rozilan bin Abdul Rahman, raises a preliminary objection. He submits that all the four supporting affidavits are invalid on the ground that they do not have a jurat in the form as prescribed by O. 41 r. 1(7) and (8) of the RHC. As the affidavits are invalid, therefore (he submits), the interlocutory application is without any supporting affidavit. And, as it is without any supporting affidavit, it follows it should be dismissed with costs.

Encik Rozilan informs this court that prior notice of the preliminary objection has been given to the counsel for the plaintiff on 28 July 1999.

Order 41 r. 1(7) and (8) reads:

> (7) Every affidavit must be signed by the deponent and the jurat **must** be completed and signed by the person before whom is sworn.
>
> (8) A jurat must be in one of the forms in Form 78. [emphasis are added]

Do note the word "must" in sub-rr. (7) and (8).

Form 78 provides:

No 78
FORMS OF JURAT (O. 41 r. 1)
(Title as in action)

(a) To an affidavit by one deponent ... Sworn (or affirmed) on the ... day of ... 19 ...

at (Through the interpretation of ...).

Before me

...

Commissioner for Oaths

(b) To an affidavit by two or more deponents ... Sworn (or affirmed) by the deponents ... and ... (or by both (or all) of the abovenamed deponents) on the ... day of ... , 19 ... at (Through the interpretation of ...).

Before me

...

Commissioner for Oaths

(c) To an affidavit by an illiterate or blind person ... Sworn (or affirmed) on the ... day of ... 19 .... ,at ...

I, having truly, distinctly and audibly read over the contents of the above affidavit (add if exhibits are referred to in the affidavit "and explained the nature and effect of the exhibits therein referred to") to the said deponent who seemed perfectly to understand the same and who made his mark thereto in my presence (Through the interpretation of ...).

Before me

...

Commissioner for Oaths

(d) To an affidavit by a person who does not understand English. Sworn (or affirmed) on the ... day of ..., 19 ... at ... through the interpretation of ... (if the interpreter is not a court Interpreter add the following: "the said ... having been first sworn that he had truly, distinctly, and audibly translated the contents of his affidavit to the deponent ... and that he would truly and faithfully interpret the oath (or affirmation) about to be administered unto him the said ...).

Before me

...

Commissioner for Oaths

Encik Rozilan submits that the jurat should be in one of the above forms, depending on the circumstances of the deponent (*ie*, whether he understands the language used; or whether he is blind or illiterate). He submits that if the deponent is conversant in the Malay language and is not illiterate (or blind) then the jurat should be in Form (a), since the affidavits are in the Malay language.

What is a "jurat"? It is not defined either in the RHC or in the Courts of Judicature Act 1964. Nor is the term defined in the Interpretation Acts 1948 and 1967. In *Jowitt's Dictionary of English Law* (1977 edn) "jurat" is defined as:

> **Jurat**, the statement at the foot of an affidavit of the names of the parties swearing it, and of the officer before whom it is sworn, of the date, and of any other necessary particulars, as the affidavit of an illiterate or blind person as read in the presence of an officer to such person and that he seemed perfectly to understand it (R.S.C., Ord. 41, rr. 1, 3).

In *Malaysian Court Practice* (Malayan Law Journal Sdn Bhd 1997), High Court, 1, at p. 2515, the meaning of "jurat" is explained as follows:

> **[41.1.13] Jurat**
>
> A jurat means a certificate of the administering officer or a person before whom the affidavit was sworn. It refers to the clause written at the foot of the affidavit, stating when, where, and before whom such affidavit was sworn. A jurat must be in one of the forms in Form 78. Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

In the present case, the jurat in the affidavits is in the following form (taking encl. 3 as an example):

DIIKRARKAN oleh)
HAN FU TIAM) t.t
di TEMERLOH pada)
pukul 3.45 pm 20/7/99)

Di hadapan saya

t.t. [name and cop]

...

Pesuruhjaya Sumpah

Encik Joseph Sebastian, the learned counsel for the applicant/plaintiff, concedes that the above jurat is not in any of the forms (*ie*, (a) – (d)) prescribed by Form 78. He, however, argues that the above jurat is in order and urges this court to accept it.

He further submits, in the alternative, that if the court is of the view that the jurat is defective, he applies for the leave of this court to use the affidavit, citing O. 41 r. 4 which provides:

> **4. Use of defective affidavit (O. 41 r. 4)**
>
> An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

In my judgment, there is merit in this preliminary objection. Clearly there has not been compliance with O. 41 r. 1(7) and (8) and Form 78. First, there is no title in the jurat used in all the four affidavits. A jurat is a certificate and it is clear Form 78, by the presence of the words:

> *(Title as in action)*

appearing at the top part of the Form, that the title of the action must be stated at the top part of the certificate.

Second, neither the words – "To an affidavit by one deponent ..." (see Form 78(a) not the word To an affidavit by a blind [illiterate] person ..." (see Form 78(c), as the case may, are found in the jurat. These words are of significance because they not only certify the circumstances of the deponent in the making of the affidavit but they also indicate which particular form in Form 78 (*eg*, whether Form 78(a) or Form 78(c)) is being used. If the deponent is neither blind nor illiterate but is not conversant in the Malay language (bearing in mind in the present case that the affidavit is in the Malay language), then Form 78(a) must be used. The affidavit must be interpreted to him in the language that he understands by a competent interpreter, and thereafter that part of the form which reads "(Through the interpretation of ...)" must be completed accordingly. The full name of the interpreter (together with his identity card number) and the language (for example, Mandarin or Cantonese) used by him to interpret the contents of the affidavit to the deponent must be recorded in the blank spaces provided in the brackets.

If, on the other hand, the deponent is conversant in the Malay language (and is not blind or illeterate), the form that must be used is still Form 78(a) and the aforesaid part of the form may still be completed. But it must now be completed by inserting in the blank spaces within the brackets the words "[interpretation not required] in the following manner:

> (Through the interpretation of [interpretation not required])

This is one manner of dealing with the matter. Alternatively, and an easier way, would be for the Commissioner of Oath, when preparing the jurat certificate, to simply drop the whole words in the brackets (*ie,* the words "(Through the interpretation of ...)") from the form. When the words in the brackets do not appear in the jurat certificate, the court will assume that the deponent is conversant in the Malay language.

However, although this is an easier way, yet, I think, the former method is preferable because the jurat would then expressly indicate that the Commissioner of Oath signing the jurat had addressed his mind to the question of the deponent's understanding of the language used in the affidavit. Thus, the question of the court making an assumption on the language proficiency of the deponent does not arise.

If the deponent is blind or illiterate, then Form 78 (c) must be used.

To sum up, it is my finding that there has been a departure from the prescribed format and that such departure is not trivial in nature. There has been a substantial deviation. In view of this substantial deviation and bearing in mind that O. 41 r. 1(7) and (8) use the word "must", I am unable to accept the jurat, as used by the plaintiff, as a valid jurat. To my mind, the extent of the defect is serious; it is as good as not having a jurat. In my judgment, strict compliance with the prescribed format is mandatory.

Without a jurat or without a valid jurat the affidavits are defective and therefore cannot be accepted. The interlocutory application is thus without a supporting affidavit. It must fail.

Finally, I shall deal with Encik Sebastian's (counsel for the applicant) oral application for leave to use the defective affidavit pursuant to O. 41 r. 4, as I have mentioned earlier. Encik Rozilan objects to this oral application on the ground that the learned counsel for the plaintiff/applicant should not have made this application at the eleventh hour when notice of the preliminary objection had been given several days before the hearing. He submits that, in any case, there should have been a formal application filed well before today's hearing. I uphold this objection. This last minute oral application is yet another example of lip service application of the rules of procedure. I agree that if Encik Sebastian is serious about invoking r. 4, there should have been a proper formal application made at the earliest opportunity. Of course, needless to say, whether he would have successful in his application, had there been one made, is another matter.

This preliminary objection is, therefore, upheld. The application is, accordingly, dismissed with costs.